NUMBER 13-18-00589-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JACOB ALEXANDER SAUNDERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 413th District Court of Johnson County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Tijerina

A jury convicted appellant Jacob Alexander Saunders of unlawful possession of a controlled substance in penalty group one, between two and four hundred grams of heroin, a second-degree felony, and assessed punishment at sixteen years' imprisonment. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(d). By seven issues,

which we have reorganized and renumbered, Saunders argues that (1) the evidence is insufficient to support the conviction; (2) the trial court violated his due process rights; and (3-7) the trial court erred by admitting evidence over his objections. We affirm. [1]

I. BACKGROUND

Cleburne Police Department Officer Clifton D. McFatridge testified that on August 7, 2018, he was dispatched to a hotel in reference to a male subject, later identified as Saunders, refusing to pay his bill. The trial court admitted Officer McFatridge's bodycam video into evidence. In the video, Officer McFatridge asked Saunders for his name and date of birth to which Saunders responded with a fictitious name. Officer McFatridge was unable to establish his identity based on that information. After Saunders provided Officer McFatridge with his real name and date of birth, Officer McFatridge learned that Saunders had several warrants for his arrest, and he arrested Saunders based on the outstanding warrants and for failure to identify. Upon searching Saunders, Officer McFatridge discovered a Visine bottle inside Saunders's pants pocket. He stated that Saunders "was acting very nervous about it," "he was very jittery about it, [and] didn't want to really acknowledge it was even there." Forensic testing later determined that the substance in the Visine bottle was heroin.[2]

Conversely, Saunders testified that the Visine bottle contained water and hydrocodone. According to Saunders, he takes prescribed pain medication for injuries he sustained in a car accident over ten years ago. He explained that the hydrocodone was

[1] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] Forensic Scientist Lindsay Gasche testified that the Visine bottle contained approximately 4.37 grams of heroin.

in the Visine bottle because he dissolves the pills in water, and he snorts the medication "through the nose" as "another way of taking it." He denied that heroin was in the bottle. The State asked, "You're telling me that this brown, disgusting liquid in the bottom of this, this is a hydrocodone pill that was prescribed to you by a doctor dissolved in water," to which Saunders responded, "Yes, sir."

A jury convicted Saunders, and this appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

By his first issue, Saunders argues that the evidence is legally insufficient to support his conviction for possession of heroin because there was "insufficient evidence showing that he knew heroin was in the Visine bottle."

A. Standard of Review and Applicable Law

We review the sufficiency of the evidence in the light most favorable to the verdict and then determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury is the sole judge of witness credibility and the weight to be attached to witness testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). Moreover, direct and circumstantial evidence are equally probative. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016). Not every fact presented must directly indicate that the defendant is guilty, so long as the cumulative force of the evidence is sufficient to support a finding of guilt. *Nowlin v. State*, 473 S.W.3d

312, 317 (Tex. Crim. App. 2015).

A conviction for possession of a controlled substance is supported only when the evidence establishes that the defendant "knowingly or intentionally possesse[d]" the alleged controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist." TEX. PENAL CODE ANN. § 6.03(b). Proof of possession requires evidence that the accused exercised "actual care, custody, control, or management" over the substance. TEX. HEALTH & SAFETY CODE ANN. § 481.002(38). Thus, the State must prove the accused (1) "exercised control, management, or care over the substance" and (2) knew that the substance "possessed" was contraband. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988) (en banc). In determining whether the defendant actually knew that he possessed narcotics, the jury may infer the defendant's knowledge from his acts, conduct, remarks, and from the surrounding circumstances. *Menchaca v. State*, 901 S.W.2d 640, 652 (Tex. App.—El Paso 1995, pet. ref'd).

B. Discussion

Here, the evidence shows that Officer McFatridge found the heroin in Saunders's pants pocket while Saunders was wearing them. Because the heroin was in a place over which Saunders had exclusive control, the jury could have reasonably concluded, as it did, that Saunders exercised care, management, and control over the heroin. *See Jenkins v. State*, 870 S.W.2d 626, 628 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (finding sufficient evidence of possession where narcotics were found inside defendant's front

pants pocket); *Mayes v. State*, 831 S.W.2d 5, 7 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (finding sufficient evidence of possession where a crack pipe containing cocaine was found in defendant's pants pocket). Further, the fact that the heroin was found on Saunders's person supports the inference that he knowingly possessed it. *See Jenkins*, 870 S.W.2d at 628; *see also Clark v. State*, No. 14–09–00944–CR, 2010 WL 4673713, at *2 (Tex. App.—Houston [14th Dist.] Nov. 18, 2010, no pet.) (mem. op., not designated for publication) ("It is rational for a jury to conclude that an individual is aware of the contents of his pants pocket."). Moreover, because Saunders concealed the heroin in a Visine bottle, the jury could have reasonably concluded that he intentionally or knowingly possessed the heroin. *See Menchaca*, 901 S.W.2d at 652 (providing that a jury may infer defendant's intent or knowledge from his acts); *Daniels v. State*, 853 S.W.2d 749, 751 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (holding that the defendant's act of concealing a crack pipe in his pocket supported a finding of knowing possession); *Jarrett v. State*, 818 S.W.2d 847, 848 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (concluding that a defendant's attempt to hide crack pipe from law enforcement officers constituted evidence of knowing possession).

Although Saunders testified that the Visine bottle contained hydrocodone in liquid form and denied the existence of heroin, forensic testing established that the Visine bottle contained heroin. Thus, the jury was free to reject Saunders's testimony, and his testimony does not make the evidence legally insufficient as he suggests because we presume that the jury discredited his testimony *See Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (stating that "the reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the

witnesses' credibility and the weight to be given their testimony"). Saunders argues that the State did not establish that he knowingly or intentionally possessed a controlled substance because it did not present evidence affirmatively linking him to the heroin found in his pant pocket. The affirmative links doctrine applies, however, only in instances where the contraband is not found on the accused's person or when the accused does not exclusively possess the place where the contraband is found. *Utomi v. State*, 243 S.W.3d 75, 79 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *see* Evans v. State, 202 S.W.3d 158, 161–62 (Tex. Crim. App. 2006) (holding that the affirmative links doctrine "protects the innocent bystander—a relative, friend, or even stranger to the actual possessor—from conviction merely because of his fortuitous proximity to someone else's drugs"). Here, the State was not required to present evidence affirmatively linking Saunders to the heroin because it was found on his person, which is a place he exclusively controlled. *See id*.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the State presented evidence from which the jury could have rationally found Saunders (1) "exercised control, management, or care over the substance" because the bottle was found inside his pocket and (2) knew that the substance "possessed" was contraband. *See Evans*, 202 S.W.3d at 161. Accordingly, we find that the evidence was sufficient for a jury to rationally conclude that Saunders knowingly or intentionally possessed the heroin. *See id*. We overrule Saunders's first issue.

III. DUE PROCESS

In his next issue, Saunders asserts that the trial court violated his right to due process because it became an advocate "by instructing the [State] how to mark [the] State's evidence and having a witness clarify the State's presentment of the evidence."

A. Applicable Law

A judge shall not, "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. ANN. art. 38.05; *see Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003) (holding that a trial judge must refrain from making any remark calculated to convey his opinion of the case because jurors give special and particular weight to the language and conduct of the trial judge). By creating "a duty on the trial court . . . to refrain sua sponte from a certain kind of action," article 38.05 provides the defendant with a right to be tried in a proceeding devoid of improper judicial commentary. *See Proenza v. State*, 541 S.W.3d 786, 798 (Tex. Crim. App. 2017). "The trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case." *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. Discussion

The State introduced a manila envelope as exhibit number three. Officer McFatridge testified that he placed the Visine bottle in this folder when he submitted it into evidence. Exhibit four was a clear plastic bag containing the Visine bottle. After the State questioned Officer McFatridge about the two exhibits, the following colloquy transpired:

> [The Court]: Now Exhibit 3 is identified as the little Visine bottle?
>
> [The State]: Exhibit 3 is the packaging that the Visine bottle—
>
> [The Court]: So Exhibit 3, you have to identify—the witness needs to identify Exhibit 3 as a Ziplock bag containing a bottle of Visine,

because you didn't put the label on the bottle of Visine, which there may not be room on the bottle of Visine, but the bag itself has been tagged, so the evidence is the bag, and then needs to be clear that's what the sticker is on.

[The State]: Yes, your honor.

[The Court]: If you can clarify that.

[The State]: May I approach the witness.

[The Court]: Yes.

REDIRECT EXAMINATION

[The State]: Okay. Officer McFatridge, I'm going to show you what's been marked as State's Exhibit No. 3. Can you—and can you please identify what State's Exhibit 3 is?

[Officer]: This is the packaging that I packaged the Visine bottle in before I turned it in to evidence.

[The State]: Okay. And you describe that as a manila envelope?

[Officer]: Yes, ma'am.

[The State]: And I'm going to show you what's been marked as State's Exhibit No. 4, which is a plastic baggie containing the Visine bottle that came out of State's Exhibit No. 3.

[Officer]: Yes, ma'am.

[The State]: With your initials on it?

[Officer]: Yes, ma'am.

[The State]: And I'm going to show you what's been marked as State's Exhibit No. 4, which is a plastic baggy containing the Visine bottle that came out of State's Exhibit No. 3?

[Officer]: Yes, ma'am.

[The State]: Okay. So State's Exhibit Number—can you tell us what State's Exhibit No. 4, which is the plastic baggy, can you tell us what that contains?

[Officer]: It contains the Visine bottle that was in the manila folder that was taken off Mr. Saunders.

[The State]: Okay.

[The Court]: Any further questions?

[Saunders]: No further, questions.

Saunders asserts that the trial court "took over the presentation of the State's evidence and became [an] advocate." However, "[a] trial judge has broad discretion in maintaining control and expediting the trial." *Jasper v. State*, 61 S.W. 3d 413, 421 (Tex. Crim. App. 2001). The trial court's question was aimed at clearing up a point of confusion: the trial court mistakenly perceived exhibit three as the clear bag containing the Visine bottle, but exhibit three was the manila envelope. *See id*. "None of the trial judge's comments rose to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *Id*. Moreover, the trial court did not ask the witness any questions. *See Guinn v. State*, 209 S.W. 3d 682, 685-86 (Tex. App.—Texarkana 2006, no pet.) (noting that some of the trial court's questions of the defendant appeared to go beyond what was necessary for a determination of placement of community supervision). Thus, the trial court did not become an advocate of the State. Accordingly, we conclude that the trial court did not abandon its role as a neutral arbiter when it asked the State for clarification on its labeling of the evidence. *See Proenza*, 541 S.W.3d at 798. We overrule Saunders's second issue.

IV. ADMISSION OF EVIDENCE

By his issues three through seven, Saunders contends that the trial court erred by admitting the State's exhibits one through five over his objections because the exhibits were not pre-marked at least three days before the commencement of trial as required by

the trial court's scheduling order. According to Saunders, the State "willfully disregarded the pretrial order."

A. Standard of Review

We review the trial court's ruling on the admission of evidence for an abuse of discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018); *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *Amberson v. State*, 552 S.W.3d 321, 327 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (en banc). When considering a trial court's decision to admit or exclude evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Id*. at 391; *see Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003). If the trial court's decision to admit or exclude evidence aligns with any theory of law applicable to the case, its decision will not be disturbed. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006); *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

B. Discussion

Here, the trial court imposed a discovery order that required the State to pre-mark all exhibits with the court reporter three days prior to trial. *See* TEX. CODE. CRIM. PROC. ANN. art. 39.14. The following exhibits were not pre-marked three days before trial: (1) Officer McFatridge's body camera video; (2) a picture of Saunders's belongings, which Officer McFatridge seized; (3) a manila envelope that contained the Visine bottle; (4) the plastic baggie containing the Visine bottle; and (5) Forensic Scientist Lindsey Gasche's lab report.

When the trial court admits evidence offered by the State that was not produced in compliance with a discovery order, the relevant inquiry is whether the State acted with specific intent to willfully disobey the discovery order by failing to turn over the evidence. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). "Evidence willfully withheld from disclosure under a discovery order should be excluded from evidence." *Id*. (citing *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978). However, Saunders does not contend the following: (1) that he did not have notice of the State's intent to admit exhibits one through five; (2) that he did not have actual knowledge of exhibits one through five; or (3) that he was surprised by this evidence. Instead, he merely claims that the State did not pre-mark those exhibits three days before trial, and his argument is limited to the same. In that regard, the trial court explained:

> I understand that not all exhibits are available three days before trial, and the Court does not expect that exhibits that are not available three days before trial, for example, those that are in custody of law enforcement and law enforcement centers, those are not expected to be marked three days ahead of time. They never have been marked three days ahead of time. What the order intends to suggest is that the attorneys can speed up the trial process if they would mark the exhibits to the best of their ability prior to trial. So your objection is overruled.

Moreover, the State explained to the trial court that Saunders had over one year to review the State's discovery, which included the complained-of items and had been on file since January 17, 2017. Thus, the State's conduct was not calculated to frustrate Saunders, and there is no evidence that the State willfully or knowingly failed to timely disclose the evidence. *See Pena v. State*, 864 S.W.2d 147, 149 (Tex. App.—Waco 1993, no pet.) (holding that evidence should not be excluded absent bad faith or willfulness of the State). Therefore, we cannot say that the trial court abused its discretion in admitting the

evidence. *See Beham*, 559 S.W.3d at 478. We overrule Saunders's issues three through seven.

V. CONCLUSION

We affirm the judgment of the trial court.

JAIME TIJERINA,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
25th day of June, 2020.